Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

SC TESTING TECHNOLOGY, INC., *et al.*,

Petitioners,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The Maine Supreme Judicial Court

PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the doctrine of preemption precludes the State of Maine from asserting the repeal of an emissions testing program as a defense in a contract action, when the program was at the time of the repeal included in the State Implementation Plan submitted by the State which had been approved by the Environmental Protection Agency under the Clean Air Act?

LIST OF PARTIES

Petitioners are SC Testing Technology, Inc. and its parent, Systems Control, Inc. SC Testing Technology has no subsidiaries and no other parent corporations. Systems Control, Inc. has no parent, and its only non-wholly owned subsidiaries are Tejas Testing Technology One, L.C. and Tejas Testing Technology Two, L.C., both Texas limited liability companies.

The other respondents are the State of Maine; the Maine Department of the Secretary of State, Bureau of Motor Vehicles; Edward O. Sullivan, individually and as commissioner of the Maine Department of Environmental Protection; and Gregory G. Hanscom, individually and as director of the Maine Bureau of Motor Vehicles.

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PETITION FOR CERTIORARI

SC Testing Technology, Inc. and Systems Controls, Inc. respectfully petition for a writ of certiorari to review the judgment of the Maine Supreme Judicial Court in this case.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court is reported at 688 A.2d 421 (Me. 1996). The opinion of the Maine Superior Court is unreported.[1]

JURISDICTION

The Supreme Judicial Court entered its judgment on December 30, 1996. Petitioner filed a timely motion for reconsideration on January 9, 1997, which was denied by order dated January 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257.

[1] The opinion of the Supreme Judicial Court of Maine is set forth in Appendix A, the order of the Supreme Judicial Court denying the Motion for Reconsideration in Appendix B, the opinion of the Superior Court in Appendix C, and the Maine statutes establishing and repealing the Motor Vehicle Testing Program, as well as other lengthy statutory and regulatory material, in Appendix D.

REGULATORY, STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C.A. § 7407(a) requires each state to submit a State Implementation Plan ("SIP") to comply with federal clean air standards:

> Each State shall . . . submit[] an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within . . . such State.

42 U.S.C.A. § 7416 expressly preempts state action inconsistent with a federally-approved SIP:

> [I]f an emission standard or limitation is in effect under an applicable implementation plan . . . such state or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan. . . .

40 C.F.R. § 51.105 restricts the ability of a state to amend its SIP without prior EPA approval:

> Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this Part.

Chapter 28 of Title 38, Maine Revised Statutes Annotated ("M.R.S.A.") and 29-A M.R.S.A. § 403 established a mandatory Motor Vehicle Emissions Inspection Program. Section 2402 of Title 38 provided for mandatory motor vehicle inspections:

> After July 1, 1994, each motor vehicle registered in any area designated by the Federal Government under 40 Code of Federal Regulations,

> Part 81 as nonattainment for ozone and classified as a moderate or more severe attainment area must be inspected biennially for air pollution emissions as provided in this chapter. . . .

Section 2404 of Title 38, M.R.S.A., required the commissioner of the Maine Department of Environmental Protection to contract with a private firm to implement the program:

> 2. Contract for services. The commissioner shall contract with a private entity for the design, construction, equipping, establishment, maintenance and operation of public emission inspection stations and related services and functions.

The federal Environmental Protection Agency conditionally approved a revision to the State's SIP incorporating the Motor Vehicle Inspection Program by final action published in 59 F.R. 55045 (Nov. 3, 1994):

> In this action, EPA is conditionally approving a revision to the Maine Department of Environmental Protection (DEP) State Implementation Plan (SIP) for Inspection and Maintenance (I/M). . . .

Maine P.L. 1995, c. 49 and P.L. 1995, ch. 50, repealed Chapter 28 of Title 38, M.R.S.A. and 29-A M.R.S.A. § 403, the Motor Vehicle Inspection Program.

Article VI of the United States Constitution provides that "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Other statutes and regulations implicated are set out in Appendix D because of their length. They include the following:

42 U.S.C.A. § 7602(k)

42 U.S.C.A. § 7604(e)

42 U.S.C.A. § 7410(k)(4)

Environmental Protection Agency, Final Rule – Approval and Promulgation of Air Quality Implementation Plans; Maine; Enhanced Inspection and Maintenance in Androscoggin, Cumberland, Kennebec, Knox, Lincoln, Sagadahoc, and York Counties, 59 F.R. 55045 (Nov. 3, 1994)

40 C.F.R. § 52.1019 (1995)

Chapter 28 of Title 38, M.R.S.A., repealed by P.L. 1995, c. 49, § 2 and P.L. 1995, ch. 50, § 2 (full text).

29-A M.R.S.A. § 403

Maine P.L. 1995, c. 49 and P.L. 1995, ch. 50

STATEMENT

The State of Maine enacted Chapter 28 of Title 38, M.R.S.A. (the "MVEIP Law") in 1992 to comply with the

requirements of the Clean Air Act.[2] App. A-1. Section 2404 of the MVEIP Law, App. D-8, required the Maine Department of Environmental Protection ("MDEP") and the State to privatize the program through a contract with a private entity with a term of not less than five years. The statute required that the contractor design, construct, equip, maintain and operate public emissions inspection stations that would implement the program. *Id.*

On February 4, 1994, Petitioner Systems Control, Inc.[3] entered into a contract with MDEP and the State to design, build and operate seven emission testing facilities. R.I, 27-99, 144.[4] The contract had a term of 7 years and 3 months, commencing July 1, 1994, and had an anticipated value of $43 million. R.II, 465. Petitioners invested over $13.5 million in the project and fully performed their obligations. *Id.*; R.II, 43-45.

On July 21, 1994, the MDEP sent the federal Environmental Protection Agency ("EPA") a document entitled "Revisions to the State Implementation Plan for the Control of Ozone Air Pollution – the State of Maine Implementation Plan for Inspection/Maintenance" (the "Revised SIP"). R.II, 427-454. The Revised SIP committed

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[2] The full text of the MVEIP Law is found at App. D-3 to D-11. The MVEIP Law was supplemented by 29-A M.R.S.A. § 403, as amended in 1993, to add a mandatory registration enforcement mechanism to comply with EPA regulations. App. D-11.

[3] Systems Control, Inc. later assigned the contract to SC Testing Technology, Inc., its wholly owned subsidiary.

[4] We cite the record before the Supreme Judicial Court as "R."

the State to establish and maintain the Motor Vehicle Inspection Program, and attached as appendices the MVEIP Law and the contract with Systems Control. R.II, 429-430. MDEP's cover letter said that the inspection program was "required pursuant to the Clean Air Act Amendments of 1990." R.II, 427. The Revised SIP was conditionally approved by EPA on November 3, 1994. 59 F.R. 55045, App. D-2. EPA's identification of Maine's SIP in the Code of Federal Regulations incorporated the MVEIP Law by reference. 40 C.F.R. § 52.1019, App. D-3.

The program proved unpopular, and a state senator requested the Maine Attorney General to advise the legislature on the consequences of repealing the MVEIP Law. On August 9, 1994, the Maine Attorney General replied that repeal of the MVEIP would violate the Clean Air Act and result in federally imposed sanctions. R.II, 467.

On April 27, 1995, the Maine Legislature repealed the MVEIP Law.[5] The fiscal note to the repealing legislation states that the repeal "may result in . . . federal sanctions for noncompliance with the Clean Air Act Amendments of 1990." R.III, 86.

The State and MDEP treated the repeal as terminating the contract, and Petitioners were forced out of business. Petitioners brought this action to recover damages under their contract in a complaint which alleged that the repeal was "contrary to the requirements of the federal

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[5] The repeal occurred before any failure of the State to comply with the conditions imposed by EPA in the conditional approval.

Clean Air Act Amendments of 1990 [and] constituted a violation of federal law." Complaint, ¶ 44, R.I, 15. In their answer Respondents claimed that the repeal excused their breach because Petitioners assumed the risk of repeal, either under the contract or as a matter of state procurement law, R.I, 138, and that Petitioners "lack standing to assert that any action of any Defendant was contrary to the Clean Air Act Amendments of 1990, or . . . constituted violations of federal law," R.I, 137; and counterclaimed for a declaratory judgment. In their reply to the counterclaim, Petitioners asserted as an affirmative defense that "[t]he suspension and repeal of the MVEIP Law . . . violated the State's State Implementation Plan and applicable federal law." Reply, Aff. Defense 16, R.I, 354.

Petitioners moved to strike Respondents' affirmative defense of assumption of risk, and for summary judgment as to liability, on the ground that the repeal of the MVEIP Law violated the State's obligations under its SIP and the Clean Air Act. Petitioners contended that the repeal was void because it was expressly preempted under 42 U.S.C.A. § 7416 and because it conflicted with federal law; and, since the repeal was void, any allocation of the risk of repeal was moot and could not afford a defense to Petitioners' contract claim. Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment on Liability and to Strike Affirmative Defenses, and In Opposition to Defendants' Motion for Judgment on the Pleadings, at 31-39.

The Superior Court granted summary judgment to Defendants. The trial court[6] found that "the doctrine of federal preemption [did not] apply," App. C-9, and stated that:

> [Systems Control] places significant focus on a claim that federal laws preempt and prevent the State's action repealing the Emissions Testing Program. However, the preemption position, if it were sound, in no way supports the damages award SCI is seeking. At best, it would support a mandate to the State to take additional steps to clean up air pollution if that pollution were found to exceed federally acceptable levels.[7]

App C-8.

On appeal to the Maine Law Court, Petitioners asserted the following issue:

> Did the Superior Court err in finding that the Supremacy Clause and the doctrine of preemption do not preclude Defendants' assertion of the repeal of the MVEIP Law as a defense?

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[6] We refer to the Superior Court as the "trial court" and, following local practice, to the Supreme Judicial Court as the "Law Court."

[7] Contrary to the trial court's opinion, Petitioners seek damages under the common law of contract, not preemption. Petitioners invoke the doctrine of preemption to strike affirmative defenses, not for affirmative relief.

Brief of Appellants at 18, Statement of Issues, ¶ 5.[8] Petitioners' appellate brief contained extensive analysis of both express and conflict preemption. *Id.* at 49-64.

The Law Court affirmed the decision below on the ground that the contract and state procurement law allocated the risk of repeal to Petitioners, and that the repeal therefore barred Petitioners' claim. The Law Court noted that the emissions testing program "was part of a plan to comply with the federal Clean Air Act," App. A-1, but did not address the preemption issue. Petitioners filed a Motion for Reconsideration, again asserting preemption; that motion was denied. App. B-1.

REASONS FOR GRANTING THE WRIT

By repealing the MVEIP Law, the State clearly violated both its EPA-approved SIP, which has the force of federal law, and the express preemption provisions of the Clean Air Act. The Maine Legislature acted with express recognition, upon advice of the Maine Attorney General, that the repeal would put the State in violation of the Clean Air Act. Allowing the State to assert the repeal as a defense to Petitioners' contract claim would permit the State to benefit from its own knowingly illegal action, and would give effect to a statute which is void under the Supremacy Clause.

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[8] Under Maine practice, the issues presented for review on appeal are stated in the appellant's brief; there is no separate designation of error or issues on appeal. *See* M.R.Civ.P. 75A(a)(3).

The constitutional infirmity of the ruling below is plain under this Court's decisions. This Court has expressly recognized the vital role played by SIP's in achieving the Congressional goal of improving air quality nationwide. That goal is thwarted by the Law Court's refusal to recognize the EPA-approved SIP as having the force of federal law. The decision below should also be reviewed because of the Law Court's apparent unwillingness to recognize, much less apply, controlling federal principles in a case involving substantial claims against the State. Given the nationwide trend towards privatized governmental programs, there is also a national interest in a determination by this Court of the extent to which a state can repeal a program mandated under federal law and then assert that repeal as a defense to a claim under the contract implementing the program.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH DECISIONS OF THIS COURT AND FEDERAL COURTS OF APPEALS, AND WITH THE EXPRESS PREEMPTION PROVISIONS OF THE CLEAN AIR ACT.

Assuming that the Law Court even considered the preemption issue that was directly presented to it, its ruling was necessarily based on one of two theories: either (1) the repeal was not subject to express or conflict preemption, or (2) Petitioners lacked standing to assert preemption to strike Respondent's affirmative defenses. No matter which of these theories underlay its decision, the Law Court's ruling conflicts with clear and controlling federal precedent and statutory authority.

EPA-approved SIP's have the force of federal law, *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975); *United States v. Ford Motor Co.*, 814 F.2d 1099 (6th Cir.), *cert. denied* 484 U.S. 822 (1987), and are the tools chosen by Congress in the Clean Air Act to implement the national goal of improved air quality. *Train*, 421 U.S. at 65-67; *see* 42 U.S.C.A. § 7407(a).[9] The Revised SIP, when approved by the EPA, committed the State to implement the Motor Vehicle Inspection Program as a matter of federal law.[10] The termination of the program and repeal

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[9] "The SIP provisions of the Clean Air Act play two critical roles. First, they bridge a gap between air quality standards and enforcement. Clean air became not just a goal, but an enforceable mandate. Second, the SIP process created new state-federal institutional machinery; the cumbersome, but powerful 'partnership' held together with shared responsibilities and resources, and motivated by statutory deadlines and public accountability." Novick, Stever & Mellon, *Law of Environmental Protection*, § 11.02[2] (1995).

[10] The conditional nature of EPA's approval did not impair the enforceability of the Revised SIP. Prior to the 1990 Clean Air Act Amendments, EPA interpreted the Clean Air Act to permit it to conditionally approve portions of SIP's, *see McCarthy v. Thomas*, 27 F.3d 1363, 1369 (9th Cir. 1994), and those conditionally approved portions became part of the state's enforceable SIP. *Id.* The 1990 Clean Air Act Amendments made explicit EPA's authority to issue conditional approvals, *see* 42 U.S.C.A. § 7410(k)(4), but did not undercut the enforceable nature of conditionally approved portions of a SIP. *See Natural Resources Defense Council v. EPA*, 22 F.3d 1125, 1133-35 (D.C. Cir. 1994). After the 1990 Amendments EPA continued to take the position that conditionally approved SIP's are enforceable. Memorandum from John Calcagni, Director, Air Quality Management Division, EPA, to Regional Air Program Directors, "Processing of State Implementation Plan (SIP) Submittals," July 7, 1992, at 6 ("[O]ne of the main advantages of the

of the MVEIP Law "interfere[d] with the methods by which the federal statute was designed to reach [its] goal," *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987); "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-541 (1977); and "impair significantly" a Congressionally-mandated program. *Barnett Bank of Marion County, N.A. v. Nelson*, ___ U.S. ___, 116 S.Ct. 1103, 1109 (1996). The statute effecting that repeal is therefore preempted and void because it conflicts with federal law.[11]

The repeal is also subject to express preemption. The MVEIP Law required the MDEP to "specify maximum emission levels for motor vehicles," 38 M.R.S.A. § 2403(1)(A), App. D-6, and was an "emissions standard" and "emissions limitation" for purposes of the Clean Air Act. *See* 42 U.S.C.A. § 7602(k), App. D-1. The MVEIP Law was part of the EPA-approved Revised SIP, and as such was an "emission limitation . . . in effect under an applicable implementation plan. . . . "[12] The State of Maine was

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conditional approval approach is to make the State submittal . . . federally enforceable. . . . Because the conditionally approved submittal will become a part of the SIP, the Region should be certain that the approval of the commitment will not weaken the existing SIP.") Since the State had not prior to the appeal violated any of the conditions imposed by EPA, the Revised SIP was in full force and effect as of the repeal.

[11] The repeal also conflicts with federal law because it is an impermissible attempt to modify an approved SIP without EPA approval. *See* 40 C.F.R. § 51.105.

[12] "Applicable implementation plan" is defined in 42 U.S.C.A. § 7602(q) as "the portion (or portions) of the

therefore prohibited by the express preemption provisions of 42 U.S.C.A. § 7416 from "adopt[ing] or enforc[ing] any emission standard or limitation which is less stringent than the standard or limitation under" the MVEIP Law. The repeal of the MVEIP Law violated the express provisions of § 7416 by entirely deleting the State's motor vehicle emission limitation in effect under its Revised SIP: after the repeal the State permitted unlimited vehicle emissions of pollutants, in contrast to the strict limitations imposed under the MVEIP Law.

A state law is subject to express preemption "(w)hen a federal statute unambiguously precludes certain types of state legislation. . . . " *Exxon Corp. v. Hunt*, 475 U.S. 355, 362 (1986). Section 7416 is a "federal statute [which] unambiguously precludes" inconsistent state legislation, and on its face precluded the repeal of the MVEIP Law under the facts of this case. The repealing statute is therefore void under the doctrine of express as well as conflict preemption.

Nor does the doctrine of standing afford any justification for the decision below. Petitioners have clearly suffered a distinct injury which is fairly traceable to the challenged repeal. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991). As a procedural matter, this Court has repeatedly upheld the assertion of preemption to strike affirmative defenses. *See, e.g., Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986); *Rose v. Arkansas State Police*, 479 U.S. 1 (1986).[13]

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implementation plan, or most recent revision thereof, which has been approved under [42 U.S.C.A. § 7410]."

[13] Petitioners' defensive assertion of preemption does not require compliance with the citizen's action provisions of the

The application of these settled principles to the repealing legislation would appear obvious, or at least worthy of comment. The governing federal law is so clear that the State's attorney general advised the legislature that the repeal would violate the Clean Air Act, and the legislature itself so recognized in a fiscal note to the repealer. Although the Law Court recognized that the MVEIP Law was "part of plan to comply with the federal Clean Air Act," App. A-1, its opinion did not address whether the repeal of the federally mandated program violated federal law. The Law Court studiously avoided discussing, much less applying, the doctrine of preemption.

The Law Court's probable motivation for avoiding these dispositive federal principles is clear: Maine's highest court had no desire, in a time of fiscal difficulty, to impose a multi-million dollar liability on the State. For that very reason, however, the Law Court's ruling must be subject to higher scrutiny, *see United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26-27 (1977); a State court cannot protect the State's fisc through the transparent device of ignoring controlling federal law, any more than it can by permitting the State to repudiate its obligations generally.

This Court recently addressed the ability of a governmental unit to assert the repeal of a statute as a defense to a contract action in *United States v. Winstar*, ___ U.S. ___,

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Clean Air Act, 42 U.S.C.A. § 7604. An assertion of preemption as a defense does not create a federal claim. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987). In any event, § 7604(e), App. D-1, includes a savings clause which would permit Petitioners' assertion of preemption even if that section were otherwise applicable. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

116 S.Ct. 2432 (1996). Although implicating the doctrine of preemption, not unmistakability, this petition, like *Winstar*, deals with the nexus between a governmental unit's liability in contract and its right, as sovereign within its sphere, to change or repeal laws. Governmental units at every level are increasingly devolving public programs to private contractors. Given the significant number of federal programs administered by state and local agencies and their use of privatizing contracts such as the one at issue in this case, it is appropriate for this Court to address the extent to which the repeal of authorizing legislation affords a defense in contract when the repeal conflicts with federal law.

II. THERE IS NO ADEQUATE INDEPENDENT STATE GROUND SUPPORTING THE DECISION BELOW.

The Law Court based its decision on state contract and procurement law, holding that:

> The contract between SCI and the DEP allocated to SCI the risk of legislative repeal of the program. Moreover, when a party enters into a contract with a state agency, it does so with the understanding that the Legislature may at some future time take action that nullifies the subject matter of the contract and, necessarily, the respective performance obligations of the parties.

App. A-7. Under both of these alternate grounds, the validity of the repeal is central to the Law Court's holding. The contractual allocation of the risk of repeal is moot if the repeal was not effective as a matter of federal law, and the alleged absolute defense afforded the State on repeal of authorizing legislation has no effect if the repeal was void.

A preempted state statute is "void," "without effect," and "invalid" as a matter of federal constitutional law. *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819); *Maryland v. Louisiana*, 451 U.S. 725, 746-747 (1981); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). The statute effecting the repeal was therefore void, and cannot be asserted as a defense to Petitioners' contract claims. The state law grounds for the Law Court's holding are utterly dependent upon the validity of the repeal as a matter of federal law, and are no bar to this Court's review of the federal issues presented.

CONCLUSION

The Law Court's decision is totally at odds with established principles of federalism. The state court's ruling undercuts the tool chosen by Congress to implement an important federal program; flies in the face of the express preemption provisions of the Clean Air Act; and gives the State the benefit of its knowing violation of federal law.

This Court should grant the petition to review these important issues.

Respectfully submitted,

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April 1, 1997

APPENDIX A

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 7890
Law Docket No. Ken-96-179

SC TESTING TECHNOLOGY, INC., *et al.*

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION *et al.*

Argued September 5, 1996
Decided December 30, 1996

Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, RUDMAN, DANA, and LIPEZ, JJ.

ROBERTS, J.

SC Testing Technologies, Inc., along with its Maine subsidiary, Systems Control, Inc. (collectively SCI), appeals from a summary judgment entered in the Superior Court (Kennebec County, *Alexander, J.*) in favor of the Department of Environmental Protection (DEP) on SCI's action for contract damages. SCI argues that the trial court erred in granting a summary judgment because its interpretation of the underlying contract was erroneous and there exist genuine issues of material fact. We affirm the judgment.

I.

In 1991 the Legislature enacted the Motor Vehicle Emissions Inspection Program. P.L. 1991, ch. 818, codified as 38 M.R.S.A. §§ 2401-2408 (Supp. 1994). The program, part of a plan to comply with the federal Clean Air Act

(CAA) Amendments of 1990, 42 U.S.C. §§ 7401-7671(q) (1995), was intended to reduce ozone emissions in seven counties: Androscoggin, Cumberland, Kennebec, Knox, Lincoln, Sagadahoc, and York. The legislation authorized the DEP to contract with a private entity to design, construct, equip, establish, and maintain emission inspection stations in each of the seven counties. The program was fine-tuned in 1993 by the enactment of a registration-based enforcement mechanism that required owners to present proof of compliance prior to vehicle registration. P.L. 1993, ch. 418, codified as 29-A M.R.S.A. § 403 (Supp. 1994). The program was to be financed entirely by the imposition on vehicle owners of an inspection fee, a portion of which would be retained by the private contractor.

In November 1992 the DEP began the process of selecting a contractor by issuing a Request for Proposals (RFP). In December 1992 the DEP held a proposer's conference, at which prospective contractors presented questions regarding specific aspects of the program and the RFP. Questions were also submitted directly to the DEP, which responded by providing written answers to all prospective bidders.

The proposer's conference and the submission of written questions revealed that a concern among prospective contractors was the potential economic effect of a legislative repeal of the program.[1] In February 1993 the

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[1] For example, prospective contractors submitted the following questions, which are followed by the State's answers:

> [Question:] How will the Department structure compensation and or liquidated damages to the

DEP issued an amended RFP. Section 5.N of that document, entitled "Replacement of the Contractor," concluded with the following language:

> Note: In the event the Maine Legislature repeals all or part of the program, the Department and the State of Maine shall bear no responsibility to compensate the Contractor.

Thereafter, SCI submitted a proposal and was awarded the contract the following April. Contract negotiations between the DEP and SCI concluded with a final agreement that became effective on February 4, 1994. During the course of negotiations, the DEP repeatedly refused to agree to contract terms that would have partially compensated SCI for its investment in the event of

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> Contractor in the event of replacement prior to the expiration of the Contract? Will the State discriminate between a supplantation for the convenience of the State, or repeal of the program and replacement necessitated by Contractor default? In the case of repeal or supplantation for the convenience of the State, will the State pay all Contractor costs and an additional amount to compensate the Contractor for inability to obtain a fair return on its investment?
>
> [Answer:] The State of Maine cannot guarantee compensation in the event of Contractor replacement prior to the expiration of a contract.
>
> [Question:] What kinds of protection can/will the Administration provide contractually for the bidder in the event the legislature reduces the program . . . or shortens it . . . or even cancels it?
>
> [Answer:] None. . . .
>
> [Question:] Will the Administration offer "change in law or regulation" protection?
>
> [Answer:] No.

legislative repeal of the program. Specifically, the DEP rejected contract language that would have compensated SCI for its investment in the event of termination of the contract for the State's convenience. The DEP also rejected proposed language that would have permitted SCI to treat repeal of the program as a change in the scope of the work of the contract, for which SCI could seek compensation by way of a contractual amendment.

The substantive provisions of the contract between SCI and the DEP were contained in an attached rider referred to as Rider A. Much of Rider A's language closely tracked the amended RFP, and certain of its provisions were explicitly incorporated by reference into the contract. SCI's proposal, approximately 1000 pages in length, was explicitly incorporated by reference into Rider A. Neither Rider A nor SCI's proposal contains the language of section 5.N of the amended RFP, allocating to the contractor the economic risk of repeal of the program.

Section AA of Article I of Rider A dealt with potential conflicts between language contained in Rider A and elsewhere. Section AA provided:

> *Conflicts.* This Contract shall control in the event of any conflict between the provisions hereof and the provisions of either the RFP or the Proposal. Furthermore, only as between the RFP and the Proposal, the RFP shall control in the event of any conflict between the provisions of the RFP and the provisions of the Proposal.

In anticipation of the program's July 1, 1994, start-up date, SCI established inspection facilities in the seven Maine counties. Motor vehicle inspections occurred as

scheduled during July and August of 1994, but implementation of the plan generated sharp public criticism. In response, on September 1, 1994, the DEP and SCI signed a memorandum of agreement suspending mandatory emissions testing from that date until March 1, 1995. During that period, testing would be strictly voluntary and the inspection fee would be reduced.

On February 28, 1995, prior to the resumption of mandatory emissions testing, the Legislature enacted P.L. 1995, ch. 6, which suspended registration-based enforcement of the program from March 1 until May 1, 1995. The program was permanently repealed effective April 26, 1995, through the enactment of P.L. 1995, chs. 49 and 50.

In May 1995 SCI filed a complaint against the DEP alleging, *inter alia*, a breach of contract and a breach of the implied duty of good faith and fair dealing. The court entered a summary judgment in favor of the DEP, finding that the contract allocated to SCI the entire risk of loss in the event of repeal of the program.

II.

SCI argues that the trial court erred in construing the contract to place on SCI the entire risk of loss in the event of legislative repeal of the program. On an appeal from a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was entered to determine whether the record supports the trial court's conclusion that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Simpson v. Central Maine Motors, Inc.*, 669 A.2d 1324, 1325-26 (1996).

The trial court found that the risk-of-repeal note contained in section 5.N of the amended RFP was incorporated into the express agreement between SCI and the DEP by means of Rider A's conflicts clause, section AA of Article I. The court determined that the conflicts clause was unambiguous, and that its purpose was to incorporate into the contract those provisions of the amended RFP that did not conflict with the provisions of Rider A. Thus, because Rider A was silent as to the risk of loss in the event of the repeal of the program, and because nothing in Rider A conflicted with the allocation of risk expressed in the risk-of-repeal note contained in section 5.N, that note was to be read as part of the contract. In effect, the trial court concluded, the contract between SCI and the DEP was composed of Rider A, those provisions of the amended RFP that were not addressed in Rider A and that did not conflict with it, and those parts of SCI's proposal that did not conflict with either.

"[T]he paramount principle in the construction of contracts is to give effect to the intention of the parties as gathered from the language of the agreement viewed in light of all the circumstances under which it was made." *Lynch v. Ouellette*, 670 A.2d 948, 949 (Me. 1996). When the language of a contract is not ambiguous, the contract's interpretation is a question of law for the court. *F.O. Bailey Co. v. Ledgewood, Inc.*, 603 A.2d 466, 468 (Me. 1994). We agree with the trial court that the conflicts clause contained in Rider A expresses a clear intention on the part of SCI and the DEP to incorporate into their agreement those provisions of the amended RFP that were not addressed in Rider A and that did not conflict with it. Otherwise, the parties' reference to the amended RFP in

the conflicts clause would be meaningless. In construing a contract, we should avoid an interpretation that renders meaningless any particular provision in the contract. *Top of the Track Assocs. v. Lewiston Raceways, Inc.*, 654 A.2d 1293 (Me. 1995). Thus, the risk-of-repeal note contained in section 5.N of the amended RFP was incorporated in the contract by the operation of the conflicts clause. This interpretation of the contract gives effect to the unambiguous intention of the parties, as shown both by the language of the conflicts clause and the circumstances surrounding their agreement, that SCI would bear the risk of loss in the event the Legislature repealed the program.

The contract between SCI and the DEP allocated to SCI the risk of legislative repeal of the program. Moreover, when a party enters into a contract with a state agency, it does so with the understanding that the Legislature may at some future time take action that nullifies the subject matter of the contract and, necessarily, the respective performance obligations of the parties. "The Legislature of Maine may enact any law of any character or on any subject, unless it is prohibited, either in express terms or by necessary implication, by the Constitution of the United States or the Constitution of this State." *League of Women Voters v. Secretary of State*, 683 A.2d 769, 771 (Me. 1996) (quoting *Baxter v. Waterville Sewerage Dist.*, 146 Me. 211, 215, 79 A.2d 585, 588 (1951)).

In *KHK Assocs. v. Department of Human Servs.*, 632 A.2d 138 (Me. 1993), KHK was awarded a contract to lease a building to the Department of Human Services for ten years. Relying on the lease, KHK constructed a building to the Department's specifications. During the first

year of the lease, the Legislature, in response to budgetary constraints, enacted legislation reducing the appropriation for the KHK lease and requiring its renegotiation. The parties were unable to renegotiate successfully and the Department terminated the lease, whereupon KHK sued for a breach of the lease. The lease provided that the State's performance was "subject to available budgetary appropriations." In *KHK Associates,* we recognized that although KHK and the State entered into a contractual agreement, that agreement was nonetheless subject to the exercise of legislative power, which could deprive the parties of the benefit of their contract. Similarly, in the case at bar the agreement between SCI and the DEP was always subject to the possibility that the Legislature might exercise its power to repeal mandatory emissions testing at any time, thus destroying the subject matter of the agreement. Moreover, nowhere in the contract does the State affirmatively undertake to maintain the Program for any length of time.

SCI argues that the State made two affirmative representations that the program would remain in place. First, the law creating the program, which authorized the DEP to enter into the contract with SCI, provided that "[c]ontracts must require the contractor to operate the public emission inspection stations for a minimum of 5 years. . . . " 38 M.R.S.A. § 2404(2) (Supp. 1994). Second, in a memorandum dated October 1, 1993, in which the DEP responded to the first draft contract presented by SCI, a DEP negotiator stated that he could not "anticipate any contingency causing [the DEP] to voluntarily terminate the Contract *except* for Contractor's default."

SCI misapprehends the meaning of both of these actions. With regard to the language in the statute, it simply meant that any contractor selected by the DEP to administer the program would have to agree to do so for a minimum period of time sufficient to ensure program continuity. The provision in no way guaranteed, nor could it, that the legislation authorizing the program would not be repealed by a subsequent legislature. The Legislature may not enact a law that purports to bind a future Legislature. *See Opinion of the Justices,* 673 A.2d 693, 695 (Me. 1996). With regard to the statement by the DEP's negotiator, it amounts to little more than an equivocal prediction about the future. In any event, the DEP would be in no better position than the Legislature itself to bind future Legislatures. *Id.*

The entry is:

Judgment affirmed.

All concurring.

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LIPEZ, J., dissenting.

Because I cannot find any language in the contract between SCI and the DEP to support the Court's interpretation of the contract, I respectfully dissent. The Court is correct that the risk of legislative repeal of the emissions inspection program was a major point of contention during the contract negotiations. Given the focus on this point, the failure of the parties to finalize a contract that clearly addressed this important issue is remarkable. Yet that failure is unmistakable.

The first sentence of the "Conflicts" clause sets forth a deceptively simple proposition: "This Contract shall control in the event of any conflict between the provisions hereof and the provisions of either the RFP or the Proposal." That language suggests that the "contract"

provisions are distinct from two other documents, the amended RFP and the Proposal, and in the event of a conflict between the contract provisions and either the amended RFP or the Proposal, the contract controls. In reality, however, the Contract consists of Rider A, a seventy-page document attached to a signature page. Far from being a document distinct from either the amended RFP or the Proposal, Rider A, and hence the contract, includes:

1. The Proposal itself, specifically incorporated into the contract by reference.

2. Nine sections of the amended RFP incorporated by reference.

3. Other amended RFP provisions copied verbatim.

4. Modified amended RFP provisions.

There can be no conflict between the contract and the amended RFP or the Proposal because the contract *is* the Proposal and selected portions of the amended RFP. Moreover, there is no express language incorporating the entire amended RFP into the contract by reference, and hence no express incorporation of the repeal provision of the amended RFP into the contract.

In the absence of express language of incorporation relating to the amended RFP, the Court inappropriately transforms the conflicts clause of Rider A into an incorporation clause by holding that "the parties' reference to the amended RFP in the conflicts clause would be meaningless" without the incorporation of the entire RFP into the contract. The Court further concludes that "Rider A expresses a clear intention on the part of SCI and the DEP

to incorporate into their agreement those provisions of the amended RFP that were not addressed in Rider A and that did not conflict with it." Using a conflicts clause intended to resolve conflicts between documents, the Court cites the absence of conflict between documents to achieve wholesale incorporation of amended RFP provisions into the contract, including the repeal provision. This interpretation strains logic and the language of the contract.

I do not know what the parties intended by the reference in the first sentence of the conflicts clause to the amended RFP. SCI's legal arguments on this issue are no more persuasive than the State's. There is an inescapable ambiguity in that reference to the RFP which precludes the entry of summary judgment for either party. "Where there is an ambiguity in a written contract, and the record does not completely eliminate the possibility of an issue of material fact concerning the intent of the parties, summary judgment is inappropriate." *Tondreau v. Sherwin-Williams*, 638 A.2d 728, 730 (Me. 1994).

The legal consequences of this ambiguity are not avoided by the Court's application of the unmistakability doctrine. This doctrine, developed in federal case law, recognizes a presumption that when a sovereign government enters into a contract, it does not intend to limit its ability to make its own performance impossible by means of a future sovereign act. "[S]overeign power . . . governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)). The Court

asserts Maine's version of the doctrine in these terms: " . . . when a party enters into a contract with a state agency, it does so with the understanding that the Legislature may at some future time take action that nullifies the subject matter of the contract and, necessarily, the respective performance obligations of the parties." According to the Court, this understanding governed the contract between SCI and the DEP because "nowhere in the contract does the State affirmatively undertake to maintain the Program for any length of time."

The United States Supreme Court recently applied the unmistakability doctrine in *United States v. Winstar*, ___ U.S. ___, 116 S. Ct. 2432 (1996). During the savings and loan crisis of the 1980s, the Federal Home Loan Bank Board sought to encourage healthy thrifts and outside investors to take over ailing thrifts. As an inducement to act, the board agreed to permit acquiring entities to use certain accounting techniques in calculating capital reserves, the minimum levels of which were mandated by federal regulations. Subsequently, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act, which forbade thrifts from using the above-mentioned accounting techniques. Three affected thrifts brought suit for breach of contract. Although unable to agree on an opinion, seven members of the Supreme Court agreed that the United States was liable to the three thrifts in damages, and four members concluded that "application of the [unmistakability] doctrine . . . turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government." *Id.* at 2457 (Souter, J., plurality opinion). Working from that principle, the plurality concluded that

the unmistakability doctrine should not bar government liability on the contracts at issue because they could be enforced without effectively limiting sovereign authority.

I agree with the position of the plurality in *Winstar.* As in *Winstar,* the contractual obligations at issue in this case could be enforced without limiting the State's sovereign authority to act now or in the future. The Court's application of the unmistakability doctrine wrongly equates the State's need to protect its sovereign power to act with its ability to abrogate contracts without exposure to damage claims.

The Government took this position in *Winstar,* arguing that any award of substantial damages against the government for "breach of contract through a change in the law 'unquestionably carries the danger that needed future regulatory action will be deterred,' and thus amounts to an infringement on sovereignty requiring an 'unmistakable' promise." 116 S. Ct. at 2475 (quoting Brief for Petitioner). As Justice Breyer noted in his concurring opinion in *Winstar*:

> [T]his rationale has no logical stopping point. . . . It is difficult to see how the Court could, in a principled fashion, apply the Government's rule in this case without also making it applicable to the ordinary contract case . . . which . . . [is] properly governed by ordinary principles of contract law. To draw the line – i.e., to apply a more stringent rule of contract interpretation – based only on the amount of money at stake, and therefore (in the Government's terms) the degree to which future exercises of sovereign authority may be deterred, seems unsatisfactory.

116 S. Ct. at 2475. In his plurality opinion, Justice Souter warned that broad application of the unmistakability doctrine could impair an important aspect of sovereignty:

> Injecting the opportunity for unmistakability litigation into every common contract action would . . . produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be 'of the essence of sovereignty' itself. From a practical standpoint, it would make an inroad on this power, by expanding the Government's opportunities for contractual abrogation, with the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements.

116 S. Ct. at 2459 (quoting *United States v. Bekins*, 304 U.S. 27, 51-52 (1938)). Absent special circumstances I do not find present here, the State's interests are best served by subjecting it to the same principles of contract law applicable to private parties. That application imposes no undue burden. The State would simply have to rely on the drafting of clear contract language, rather than legal presumptions, to protect its interests.

I would vacate the summary judgment and remand this matter to the Superior Court for inquiry by a fact-finder into the intent of the parties on the risk of repeal.

APPENDIX B

STATE OF MAINE

SUPREME JUDICIAL COURT Sitting as the Law Court	Law Docket No. Ken-96-179 Decision No. 7890
SC TESTING TECHNOLOGY, INC. *et al.* Plaintiffs/Appellants v. DEPARTMENT OF ENVIRONMENTAL PROTECTION *et al.* Defendants/Appellees	ORDER

Upon the motion of Appellants for reconsideration, it is ORDERED that the motion be, and it hereby is DENIED.

The mandate shall issue forthwith.

Date: January 22, 1997

For the Court

/s/ David G. Roberts
Justice, Supreme Judicial Court

APPENDIX C

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-95-239

SC TESTING TECHNOLOGY, INC., *et als.*,

Plaintiffs

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et als.*,

Defendants

OPINION AND ORDER

This matter is before the court for decision after hearing on:

(a) The State's and the Maine Department of Environmental Protection's (hereinafter "the State") Motion for Judgment on the Pleadings; and

(b) SC Testing Technology, Inc.'s and System Control, Inc.'s (hereinafter "SCI") Motion for Partial Summary Judgment on the issue of liability.

Because the State's Motion requires consideration of matters beyond the face of the pleadings, the State's motion is also properly considered as a motion for summary judgment.

CASE HISTORY:

By this action, SCI is seeking money damages from the State for termination of the Motor Vehicle Emissions

Inspection Program created by State law, contracted to SCI to perform and terminated by State legislative action approximately seven months after implementation had begun.

The factual and legal history of the Motor Vehicle Emissions Inspection Program is not subject to serious dispute.

Based on measurements taken in the late 1980's, nine Maine counties were found to exceed federal ozone standards of 12 parts per million. Those counties were designated as "nonattainment for ozone" by the U.S. Environmental Protection Agency "(EPA)" under 42 U.S.C. § 7407(d) and 7511(a). Seven of these counties were also classified as being "moderate nonattainment areas" under 40 C.F.R. Part 81, § 81.320. Those counties were Androscoggin, Cumberland, Kennebec, Knox, Lincoln, Sagadahoc, and York Counties.

Under the Clean Air Act Amendments of 1990, 42 U.S.C. § 7401 *et seq.*, the State was required to take steps to control ozone air pollution in areas designated as "nonattainment for ozone" under 42 U.S.C. § 7407(D) and classified as "moderate nonattainment areas" under 42 U.S.C. § 7511(a).

In 1992, the Legislature enacted the Motor Vehicle Emissions Inspection Law, 38 M.R.S.A. §§ 2401 *et seq.* (the "MVEIP Law") designed to bring the State into compliance with the ozone standards and the Clean Air Act.

The MVEIP Law established a motor vehicle emissions inspection program (the "MVEIP Program") which required mandatory motor vehicle emissions inspections

in the seven counties for most motor vehicles weighing 10,000 pounds or less except for certain vehicles exempted under 38 M.R.S.A. § 2402.

The State developed a motor vehicle registration-based enforcement mechanism to ensure that owners of motor vehicles complied with the mandatory emissions inspection provided in the MVEIP Program. As part of this effort, the Legislature enacted 29-A M.R.S.A. § 403 requiring owners of motor vehicles to present a certification of compliance or waiver, as defined by 38 M.R.S.A. § 2401, at the time they registered their vehicles.

The Legislature required the State to enter into a contract for a period of at least five years with a private entity to provide for the design, construction, equipping, establishment, maintenance and operation of public emissions inspection stations to provide mandatory emissions tests in the seven Moderate Nonattainment Counties, 38 M.R.S.A. § 2404.

The contractor was to issue certificates of compliance, for purposes of 29-A M.R.S.A. § 403, for vehicles that passed the emissions test. For vehicles that failed, the contractor was to issue written inspection reports describing the reasons for the rejection. The private contractor was obligated to collect test fees established by the State, to cover both its own costs and the State administrative costs, 38 M.R.S.A. § 2407.

Around November 23, 1992, DEP solicited proposals for construction and implementation of an auto emissions inspection program by issuing a Request for Proposals ("RFP").

The RFP was issued pursuant to Subchapter I-A of Title 5 of the Maine Revised States, 5 M.R.S.A. § 1825-A *et seq.*, and the rules promulgated thereunder, which govern the competitive bidding process for certain contracts entered into by the State of Maine and its departments and agencies.

The RFP provided in part:

> The Department reserves the right to expropriate or replace the Contractor in any and all aspects of management or operation of the program during the time an executed contract is in force. Expropriation would result from the repeal of all or the pertinent part of the statutory or regulatory authority for the program or fiscal funding.

On December 18, 1992, a proposers' conference was held and was attended by representatives of SCI. During that conference someone asked if the language quoted above meant that if the Maine Legislature repealed the MVEIP Law, the contractor would receive no compensation. A representative of the DEP in attendance at the conference responded that it meant exactly that.[1]

On February 5, 1993, DEP issued an amended RFP which modified the provision quoted above to eliminate any reference to expropriation, and added the following "Note":

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[1] There may be dispute as to exactly what was said, but that dispute is not material to resolution of this case. Anyone attending the December, 1992 meeting was well on notice that repeal possibilities were an issue.

> Note: In the event the Maine Legislature repeals all or part of the program, the Department and the State of Maine shall bear no responsibility to compensate the Contractor.

The amended RFP also included an Appendix D, entitled "Response to Comments," which addressed questions and comments submitted by various firms that had an expressed interest in bidding on the MVEIP contract. Appendix D contained the following questions and response:

> 103. Page 27, N. How will the Department structure compensation and or liquidated damages to the Contractor in the event of replacement prior to the expiration of the Contract? Will the State discriminate between a supplantation for the convenience of the State, or repeal of the program and a replacement necessitated by Contractor default? In the case of repeal or supplantation for the convenience of the State, will the State pay all Contractor costs and an additional amount to compensate the Contractor for inability to obtain a fair return on its investment? (D)
>
> The State of Maine cannot guarantee compensation in the event of Contractor replacement prior to the expiration of a contract.

On February 18, 1993, four proposals, including the SCI proposal, were submitted in response to the amended RFP.

A Contractor Selection Committee was established and voted to award the MVEIP contract to SCI.

The award of the MVEIP contract to SCI was administratively appealed and was stayed pending the outcome

of the appeal. The award was ultimately affirmed by a three-member committee impaneled by the Bureau of General Services to hear the appeal. This decision was not appealed to the Superior Court and therefore became final.

The State and SCI then entered into detailed negotiations over the specific terms of the contract. One of the principal issues in the negotiations was the provision surrounding the possibility of legislative repeal. The parties are not in agreement as to what happened regarding the repeal provision during these negotiations. However, there is no dispute that on February 4, 1994, the contract which is in the record was finally approved.

Under the contract, SCI established inspection facilities for emissions testing in the seven counties and began operations on July 1, 1994. SCI alleges that it has spent over $13 million in preparing to implement its responsibilities under the contract.

For July and August, 1994, the first two months that SCI operated the MVEIP Program on behalf of the State, the Bureau of Motor Vehicles mailed owner notices to the owners of motor vehicles required to be tested during those months.

While the MVEIP legislation had been enacted without much public controversy, implementation generated sharp public protests.

On September 1, 1994, SCI and the State executed a Memorandum of Agreement which, among other things, suspended the mandatory provisions of the MVEIP Program for a six-month period, replaced it with a voluntary

testing program, and reduced the amount of testing fees to be collected for each vehicle tested. During the six-month period of suspension, SCI operated a voluntary testing program and made certain changes to the MVEIP Program in accordance with the Memorandum of Agreement.

Mandatory testing was to resume on March 1, 1995.

On February 23, 1995, legislation was introduced to suspend enforcement of the MVEIP Program from March 1, 1995 until May 1, 1995.

By letter dated February 27, 1995, SCI notified the DEP and the State that SCI had not agreed to the proposed suspension until May 1, 1995. SCI asserted that the proposed legislation would constitute a breach of the contract and a violation of SCI's rights under both the Maine and United States Constitutions.

On February 28, 1995, the Legislature enacted and the Governor signed legislation suspending enforcement of the MVEIP Program until May 1, 1995. P.L. 1995, c. 6.

On April 26, 1995, the Legislature enacted emergency legislation repealing the MVEIP Law, which the Governor signed into law on April 27, 1995. P.L. 1995, c. 49 & 50.

This action was filed on May 26, 1995.

DISCUSSION:

Based on this history, SCI claims entitlement to recovery on theories of:

- breach of contract,

- equitable estoppel or breach of duty of good faith and fair dealing,
- unconstitutional legislative impairment of contract, and
- taking of property without constitutional required process or payment.

A claim under 42 U.S.C. § 1983 is also presented.

In addition to damages, some of the SCI pleadings seek an order from the court reinstating the program. However, the focus of briefing and discussion at oral argument indicate that this option is not being seriously pursued.

The State's pleadings assert a sovereign immunity defense. However, at oral argument, counsel for the State recognized that the MVEIP legislation authorizing the contract waived sovereign immunity for purposes of the contract. While, as counsel for the State indicated, there may be a question as to whether sovereign immunity was reimposed when the legislation was repealed, the court will assume for purposes of this consideration that the legislation authorizing the contract waived sovereign immunity. Accordingly, the doctrine of contractual sovereign immunity, *cf. Drake v. Smith*, 390 A.2d 541 (Me. 1978), will not be considered applicable to this dispute.

In their arguments, SCI places significant focus on a claim that federal laws preempt and prevent the State's action repealing the Emissions Testing Program. However, the preemption position, if it were sound, in no way supports the damages award SCI is seeking. At best, it would support a mandate to the State to take additional

steps to clean up air pollution if that pollution were found to exceed federally acceptable levels.

CONTRACT ISSUES:

Because neither the doctrine of sovereign immunity nor the doctrine of federal preemption apply, this dispute must be analyzed first and foremost under the law of contracts.

Three separate documents constitute the contract documents in this case:

(1) the request for proposals;

(2) SCI's response to the request for proposals; and

(3) the State contract.

The request for proposals included a clear and specific warning about the possibility of legislative repeal of the Emissions Inspection Program. Section 5(N) of the RFP stated: "In the event the Maine Legislature repeals all or part of the program, the Department and the State of Maine shall bear no responsibility to compensate the contractor."

Thus, all bidders responding to the RFP were put on notice of this risk.

The SCI proposal responding to the RFP did not address or disclaim the risk of legislative repeal provision.[2]

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[2] The SCI proposal is a very large document. The court has not closely reviewed every word of that proposal. However, at

After SCI became the successful bidder to develop the Emissions Inspection Program, there is no dispute as to material fact that representatives of SCI and the State had significant discussions regarding the risk of repeal provision. Those discussions were pursued in oral meetings and by exchanges of draft contract proposals. While there is some dispute as to the substance of the discussions, resolution of those disputes is not necessary to determination of this matter. There is no dispute that the final contract itself did not include a specific "no State responsibility if repealed" provision. However, the issue of possible legislative repeal and resulting responsibility was addressed in three ways:

1. The possibility of legislative repeal was acknowledged in the "Changes in the Scope of Work" section, section I(W), which indicated that: "If legislation is enacted which repeals the MVEIP and the MVEIP is not replaced, this section IW shall not apply." That section of the contract referenced procedures to be utilized in case there was a major change in the scope of the work – short of repeal – and the parties could not agree on equitable arrangements. It is significant here only in that it constitutes an acknowledgement, within the contract itself, of the possibility of repeal.

2. The "Conflicts" section AA stated that: "This contract shall control in the event of any conflict between the provisions hereof and the provisions of either the RFP or the proposal. Furthermore, only as between the RFP and

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oral argument, in response to a question by the court, counsel for SCI stated that there was nothing in the SCI proposal which explicitly responded to the risk of repeal caution in section 5(N).

the proposal, the RFP shall control in the event of any conflict between the provisions of the RFP and the provisions of the proposal."

This language is unambiguous. It says, in effect, that if something is not addressed at all in the contract but is addressed in the RFP in a way which does not conflict with the contract, then the RFP provision is applicable.

The continuing applicability of section 5N of the RFP through the Conflicts section avoids any concern that section 5N was removed from the contract. Such a removal creating a dramatic difference in the risks and economics of the contract could have created a concern that the contract would violate statutory prohibitions on significant deviations between RFPs and resulting contracts. 5 M.R.S.A. §§ 1819, 1825-B, 1825-D.

3. The contract contains an integration clause, section BB, intended to preclude reference to oral discussions and/or representations asserted to have occurred during contract negotiations as somehow amending or adding to the provisions of the contract and other documents referenced in the contract.

There is no dispute that the contract and the integration clause were entered into between sophisticated parties, dealing at arm's length and without one having a significant power advantage over the other. The integration clause is fully effective to exclude claims that oral discussions, outside the terms that appear on the face of the contract documents, modify or amend those terms. Accordingly, the differing views as to what may have been said or done in the course of contract negotiations are not material to resolution of this dispute. There are no

ambiguous terms justifying resort to oral communications under the parole evidence rule.

On straight contract analysis, the court determines the following:

1. The contract itself does not address the issue of responsibility for risk of repeal.

2. The RFP is part of the contract documents governing the parties conduct and relationships.

3. Section 5N of the RFP is clear that if there is a repeal "the State of Maine shall bear no responsibility to compensate the contractor."

4. This provision of the RFP does not conflict with any term of the contract.

5. Therefore, the RFP provision remains effective by section AA, having put all bidders on notice, and remaining as part of the contract documents, to exclude resort to damages against the State should the legislation be repealed.

Thus, on straight contract analysis, the State has no responsibility to compensate SCI for repeal of the legislation.

There are some doctrines of law that have been developed, however, to limit harsh impacts from terms of contracts entered, even between sophisticated contracting parties.

Top of the Track v. Lewiston Raceways, Inc., 654 A.2d 1293 (Me. 1995), involved a contract negotiated at arm's length between sophisticated business persons and with

an integration clause. In *Top of the Track*, the Law Court held that the law would still imply additional provisions of the contract if the additional provisions were "absolutely necessary" to performance of the contract. *Top of the Track* addressed the situation where a restaurant concessionaire contracted with a harness racing track to build and operate a restaurant. The integrated contract made no mention of continued operation of the race track. However, the Law Court ruled that factfinder could determine from extrinsic evidence whether such a condition was necessarily implied by the course of dealings of the parties.

SCI argues that continuing effectiveness of the legislation mandating the Emissions Inspection Program is a similar implied condition of the contract. However, this case has significant differences from *Top of the Track*. The *Top of the Track* concessionaires had no explicit warning in any proposal that the track might close and if the track were closed, the track owners would not be responsible. Further, the contracting documents themselves did not recognize the possibility of closure of the track. These differences distinguish this case from *Top of the Track*.

Here, SCI cannot claim surprise by the repeal. They had explicit warning in the RFP. Second, in the terms of the contract itself, SCI acknowledged the possibility and consequent risk of repeal in the changes in the scope of work section I(W). Further, the conflicts and integration clauses here serve to continue the effectiveness of the RFP warning to govern the terms of the contract.

In *Top of the Track*, the Law Court also cautioned that: "The courts have long recognized an implied covenant in

contracts that neither party shall by its unilateral action destroy or injure the right of the other party to receive the fruits or benefits of the contract or render performance impossible." 654 A.2d at 1296.

That statement certainly provides a support for SCI's claim. However, this doctrine would not be applicable where the unilateral action at issue was addressed and subject to bargaining in the contracting process.

Accordingly, SCI is not entitled to relief on its contract based claim.

EQUITABLE ESTOPPEL – GOOD FAITH AND FAIR DEALINGS:

As an alternative, SCI urges that the doctrine of equitable estoppel or the obligation of good faith and fair dealing should bar the State from the benefits of the no responsibility clause. In asserting this as a grounds for a damages claim, however, SCI has pointed to no case where equitable estoppel has been used against a governmental entity as a basis for recovery of damages.

The equitable estoppel cases cited in the briefs and discussed at oral argument, that where successful against a government entity, appear to be grouped in two categories:

(1) Cases where equitable estoppel operates to bar a governmental entity from enforcing a legal or regulatory requirement against a particular party; and

(2) Cases where equitable estoppel operates to bar recovery of benefits or other property paid or turned over to an individual in error.

Counsel has not pointed to, and the court's research has not disclosed, any case where the doctrine of equitable estoppel was utilized to require a state to affirmatively pay out sums of money as damages.

There may be no dispute as to material fact that both SCI and officials at the Department of Environmental Protection who contracted with SCI were surprised by the short duration of the program before legislative repeal. However, it is difficult to conceive how an equitable estoppel claim can be asserted against the State where contracting parties were not affirmatively misled and were warned about the risks of legislative repeal.

IMPAIRMENT OF CONTRACT:

SCI also contends that the State and United States constitutional prohibitions on impairment of contracts are violated by the legislative action here. However, the impairment of contract clauses are inapplicable to this case. An event and consequences recognized in the contracting documents occurred. The parties' obligations are affected, but not unconstitutionally impaired by that event. State legislation significantly impacting contracts with the State by limiting funds or otherwise is a regular attribute of the legislative process. It does not violate the impairment of contracts prohibitions of the State and Federal Constitutions.

TAKINGS:

SCI also claims that the repealed legislation was an unconstitutional taking of their investment in the

emissions testing facilities and program. However, this is not a classic takings case. The State has not removed, destroyed or taken over SCI's property without due process and payment, as occurred in *Michaud v. City of Bangor,* 159 Me. 491 (1963). Nor has State legislation so seriously limited the uses of the real estate on which the SCI facilities sit that the property has little or no economic value. *Cf. LaBay v. Town of Paris,* 659 A.2d 263 (Me. 1995); *Hall v. Board of Environmental Protection,* 498 A.2d 260 (Me. 1985). The property on which the SCI facilities sit remains available for whatever economic – or uneconomic – use SCI wants to put it to that is not inconsistent with State and local land use requirements which are unaffected by this legislation.

SCI's real complaint is that the repealed legislation has effectively taken away SCI's expectation of a return and potential profit on its investment. However, State or local legislation may limit or significantly reduce returns on investment and expected profits in business or uses of real estate without offense to the Constitution. *Cf. City of Portland, et al. v. Fishermen's Wharf Associates, II,* 541 A.2d 160 (Me. 1988) (approving local legislation barring uses of a development for its intended purpose which was enacted after the development had received initial municipal approval and substantial sums had been spent in support of the development);[3] *City of Portland v. Jacobsky,*

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[3] The substantial sums lost were subject to separate litigation in *Fishermen's Wharf Associates, II v. Verrill & Dana,* 645 A.2d 1133 (Me. 1994).

496 A.2d 646 (Me. 1985) (approving local legislation barring sale and distribution of materials viewed as pornographic which businesses had acquired and on which they anticipated return of investment and profits).

If "takings" theories support recovery against governmental entities for legislative action limiting anticipated returns on investment and profits, many regulatory activities could face significant damage claims. Takings claims against governmental entities are viable only where the governmental entity damages, destroys or takes over tangible property or so limits the use of real property that it has no economic use. No such takings occurred in this case.

For this reason also, SCI presents no viable claim under 42 U.S.C. § 1983. It still has its property. Its expectation of return on investment and profits is not a "property" which has been taken without due process of law or in violation of equal protection principles or other constitutional prohibitions to generate a claim under § 1983.

Certainly SCI may be able to generate strong policy arguments about fairness and equity. They were invited into the State – albeit with fair warning of the risks of repeal – they undertook a substantial investment in facilities to support the State's air pollution program, and the source of income for return on their investment was [sic] been taken away by repeal of the legislation. However, those equitable issues are properly addressed to policymakers in the executive and legislative branches. On the legal issues properly addressed to this court, there is no dispute as to material fact that SCI does not present a claim upon which relief can be granted.

The State can change its mind about the commitments it makes. As long as it gives fair warning that it might change, and it will not be responsible if it does, there is no liability for damages when the State does change its mind.

Therefore, the court ORDERS and the entry shall be:

1. The State's Motion for Judgment on the Pleadings, treated as a Motion for Summary Judgment, is **GRANTED.**

2. SCI's Motion for Partial Summary Judgment is **GRANTED** against SCI.

3. Judgment for the State that SCI is not entitled to relief in this action.

DATED: March 13, 1996 /s/ Donald G. Alexander
DONALD G.
ALEXANDER
JUSTICE, SUPERIOR
COURT

APPENDIX D

LAWS AND REGULATIONS

42 U.S.C. § 7602(k):

(k) The terms "emission limitation" and "emissions standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.

42 U.S.C. § 7604(e):

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emissions standard or limitation or to seek any other relief (including relief against the Administrator or a State Agency. . . .

42 U.S.C. § 7410(k)(4):

(4) Conditional Approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

Environmental Protection Agency, Final Rule – Approval and Promulgation of Air Quality Implementation Plans; Maine; Enhanced Inspection and Maintenance in Androscoggin, Cumberland, Kennebec, Knox, Lincoln, Sagadahoc, and York Counties, 59 F.R. 55045 (Nov. 3, 1994):

> SUMMARY: In this action, EPA is conditionally approving a revision to the Maine Department of Environmental Protection (DEP) State Implementation Plan (SIP) for Inspection and Maintenance (I/M). . . .
>
> SUPPLEMENTAL INFORMATION . . . The I/M SIP includes Chapter 12 of an amended State rule entitled "Motor Vehicle Emission Inspection Program," and additional supporting material including authorizing legislation. . . . This SIP revision will require vehicle owners to comply with the Maine I/M program in the seven moderate ozone nonattainment counties in Maine.
>
> * * *
>
> FINAL ACTION
>
> EPA is conditionally approving the Maine I/M program submitted by the State, on November 1, 1993, May 26, 1994 and July 21, 1994.
>
> Pursuant to section 110(k)(4) of the CAA, EPA is conditionally approving Maine's submission based on the commitments of the DEP. . . .

40 C.F.R. § 52.1019 (Nov. 3, 1994):

> Identification of Plan – conditional approval.
>
> (a) The following plan revisions were submitted on the dates specified.

(1) On November 1, 1993 the Maine Department of Environmental Protection submitted a revision to the State Implementation Plan (SIP) for an enhanced Inspection and Maintenance (I/M) program in Androscoggin, Cumberland, Kennebec, Knox, Lincoln, Sagadahoc and York counties. . . . On July 21, 1994, Maine submitted a revised submission. In these submissions, the State submitted adequate legal and regulatory authority to establish and implement an I/M program which meets the requirements of the Clean Air Act by September 1, 1995.

(i) Incorporation by Reference.

* * *

(B) The "Motor Vehicle Emission Inspection Program" regulation. . . .

(C) Title 38, Chapter 28, Motor Vehicle Inspection Program, and Title 29, Section 102-C, Motor Vehicle Inspection Requirements for Vehicle Registration, which are state law citations authorizing the above regulation. . . .

Chapter 28 of Title 38, M.R.S.A., repealed by P.L. 1995, c. 49, § 1 and P.L. 1995, ch. 50, § 1:

TITLE 38
(WATERS AND NAVIGATION)

Chapter 28 Motor Vehicle Emissions Inspection Program

38 § 2401. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings:

1. **Certificate of compliance.** "Certificate of compliance" means a written document with a serial number indicting that a motor vehicle complies with rules adopted pursuant to this chapter.

2. **Certificate of waiver.** "Certificate of waiver" means a written document with a serial number that indicates the requirement of compliance with rules adopted pursuant to this chapter has been waived for a motor vehicle under section 2403.

3. **Convenience public access.** "Convenient public access" means reasonable driving distance to a public emission inspection station and reasonable waiting time at a public emission inspection station to have vehicle emissions tested.

4. **REPEALED**

5. **Low-emission adjustment.** "Low-emission adjustment" means the repair or adjustment of basic emission-related components or systems such as spark plugs, air-cleaner filter, choke, engine idle speed and engine timing.

6. **Motor vehicle.** "Motor vehicle" has the same meaning as provided under Title 29, section 1, subsection 7.

7. **Public emission inspection station.** "Public emission inspection station" means a facility for motor vehicle inspection operated under contract with the department under section 2404.

38 § 2402. Inspection requirement

1. **Requirement.** After July 1, 1994, each motor vehicle registered in any area designated by the Federal Government under 40 Code of Federal Regulations, Part 81 as nonattainment for ozone and classified as a moderate or more severe nonattainment area must be inspected biennially for

air pollution emissions as provided in this chapter and must meet the requirements to Title 29, section 2502.

2. **Location of inspection.** The inspection must take place at a public emission inspection station.

3. **REPEALED**

4. **Exempt vehicles.** The following motor vehicles are exempt from the requirements of this section:

   A. A motor vehicle manufactured before the year 1968;

   B. A motor vehicle having a gross vehicle weight rating of more than 10,000 pounds;

   C. A motor vehicle exempt from safety inspection or requiring only a partial safety inspection under Title 28, section 2506;

   D. A motor vehicle with a model year less than 2 years prior to the current calendar year;

   E. A motor vehicle registered as a street rod [sic] as defined in Title 29, section 1, subsection 15-C-1;

   F. A class of motor vehicles exempted by the rules of the department because that class of vehicle presents prohibitive inspection problems or is inappropriate for inspection;

   G. A motor vehicle that obtains its power solely by means other than gasoline, such as diesel fuel, electricity and propane;

   H. Motorcycles and mopeds as defined in Title 29, section 1 and autocycles as defined in the

motor vehicle inspection manual adopted by the Department of Transportation; and

I. A motor vehicle that is driven fewer than 10,000 miles in a 24-month period, if the owner of the vehicle complies with rules establishing a method of administering and verifying this exemption. The board shall adopt such rules and shall consult with the Secretary of State before adopting the rules if the method to be established involves the office of the Secretary of State.

5. **Staggered inspection schedule.** The board may adopt by rule a mechanism to stagger biennial inspections over the first 2 years of the Motor Vehicle Emission Inspection Program.

38 § 2403. Motor vehicle Emission Inspection Program

The Motor Vehicle Emission Inspection Program is established within the department to test and inspect motor vehicles that are subject to the requirements of section 2402 for air pollution emissions.

1. **Criteria and standards.** The board, on or before January 1, 1993, shall adopt rules establishing standards and criteria governing the testing and inspection of motor vehicles for air pollution emissions and emissions equipment. The rules must:

A. Specify maximum emission levels for motor vehicles, based on the levels of emissions necessary to achieve applicable federal and state ambient air quality standards. The standards may be different for different model years, sizes and types of motor vehicles;

B. Establish testing procedures and standards for test equipment used for inspection and on-road testing devices;

C. REPEALED

D. Establish standards and procedures for the issuance and terms of certificates of compliance and waiver.

2. **Repairs.** Repairs or adjustments necessary to bring a vehicle into compliance with applicable emission limitations are the responsibility of the vehicle owner.

3. **Certificate of waiver.** A contractor operating a public emission inspection station shall issue a certificate of waiver for a vehicle that fails to pass the designated emission standard upon an initial inspection and after repair or adjustment again fails to pass the emission inspection if:

A. A low emission adjustment is performed on the vehicle; and

B. The cost or repairs performed on the vehicle exceeds the repair cost limit as specified in subsection 4.

4. **Repair cost limit.** The board shall establish by rule a repair cost limit consistent with the requirements of the federal Clean Air Act Amendments of 1990, Public Law 101-549 and federal regulation. In assessing the costs of repairs and adjustments included in the repair cost limit the following costs must be excluded:

A. Costs covered under warranty; and

B. Costs necessary to repair or replace any emissions control system or mechanism that

has been removed, dismantled or rendered in violation of Title 29, section 2189.

39 § 2404. Public emission inspection stations; contract

The Motor Vehicle Emission Inspection Program shall make available public emission inspection stations.

1. **Public emission inspection stations.** The board shall determine by rule performance standards for the number, location and size of the public emission inspection stations to provide convenient public access.

2. **Contract for services.** The commissioner shall contract with a private entity for the design, construction, equipping, establishment, maintenance and operation of public emission inspection stations and related services and functions. The contractor and its officers and employees may not be directly engaged in the business of selling, maintaining or repairing motor vehicles or selling motor vehicle replacement or repair parts, except that the contractor may repair any motor vehicle owned or operated by the contractor. The contractor's employees are not employees of the State for any purpose. The contract must require the contractor to operate the public emission inspection stations for a minimum of 5 years and may provide for equitable compensation from the Motor Vehicle Emission Inspection Fund, established by section 2408, subsection 1, for capital costs and other appropriate expenditures to the contractor, as determined by the commissioner.

3. **Inspection.** A public emission inspection station shall inspect and reinspect motor vehicles in accordance with rules adopted under this chapter.

4. **Issuance of certificate and reports.** A public emission inspection station shall issue a certificate of compliance for a motor vehicle that has been inspected and determined to comply with the rules adopted under this chapter. If a certificate of compliance is not issued, the public emission inspection station shall provide a written inspection report describing the reasons for rejection and, when appropriate, the repairs recommended to bring the vehicle into compliance with the standards and criteria.

38 § 2405. Fleet emission inspection stations; license REPEALED

38 § 2406. Prohibited acts

1. **Wrongful certification.** A person may not issue a certificate of compliance for a motor vehicle that has not been inspected in accordance with this chapter or is not in compliance with the rules of the department.

2. **Wrongful waiver.** A person may not issue a certificate of waiver for a motor vehicle that has not been inspected in accordance with this chapter and has not met the criteria of section 2403, subsection 3.

3. **Falsification of certification.** A person may not falsely create, make, alter or complete a certificate of compliance or waiver.

4. **Alteration.** A person may not materially alter or change any equipment or mechanism of a motor vehicle that has been certified to comply with the rules of the department so that the vehicle is no longer in compliance with the rules.

5. **False repair costs.** A person or repair facility may not misrepresent to a public emission inspection

station or the commissioner the estimated or actual repair costs or repairs needed to bring a motor vehicle into compliance with the rules of the department.

6. **Penalty.** In addition to any penalties under section 349, subsection 2, any person who violates this section is guilty of a Class D crime.

38 § 2407. Inspection fee

1. **Amount.** The board shall establish by rule an inspection fee to cover the cost of the inspection of a motor vehicle at a public emission inspection station, the cost of services rendered as part of the contract entered under section 2404, subsection 2 and the administrative costs of the department. The inspection fee may not exceed $24 per vehicle.

2. **Payment.** The fee must be paid for each motor vehicle inspected at a public emission inspection station at the time of inspection and is payable whether the vehicles passes inspection or not. Each vehicle that fails its initial inspection is entitled to one free inspection.

3. **Delinquency charge.** Motor vehicles inspected pursuant to this chapter after the expiration of the motor vehicle safety inspection date are subject to a delinquency charge of $10 for each month after the expiration, which must be collected by the inspection contractor and remitted to the commissioner. Revenue generated from the collection of delinquency charges must be deposited in the General Fund.

4. **Inspection fee waived.** The board shall establish, by rule, an exemption from the inspection fee under this section for those persons for whom, in

its judgment, the fee poses an unreasonable economic burden. In establishing the rule, the board shall consult with the Maine Community Action Association and other representatives of low-income people. The Motor Vehicle Emission Fund must absorb all costs associated with this waiver.

38 § 2408. Motor vehicle Emission Inspection Fund

1. **Establishment.** The Motor Vehicle Emission Inspection Fund, referred to in this section as the "fund," is established as a nonlapsing fund. The commissioner may use this fund only to pay the costs of and to administer the Motor Vehicle Emission Inspection Program and mobile source emission-related activities of the department.

2. **Revenue sources.** The revenue from the following sources must be deposited in the fund:

   A. Money received by the commissioner in the form of gifts, grants, reimbursement or appropriations from any source intended to be used for the purpose of the fund;

   B. REPEALED

   C. Interest attributable to investment of money deposited in the fund; and

   D. Proceeds of inspection fees.

29-A M.R.S.A. 403 (formerly 29 M.R.S.A. § 102-C):

1. Requirement. The owner of a motor vehicle registered in any area designated by the Federal Government pursuant to 40 Code of Federal Regulations, Part 81 as nonattainment for ozone and classified as a moderate or a more severe nonattainment area must present a certificate of compliance or waiver. . . . at the time of registration.

2. Suspension. If the owner of a motor vehicle subject to the requirement of subsection 1 fails to present a certificate of compliance or waiver, the Secretary of State shall suspend the registration certificate and plates for that motor vehicle. . . .

P.L. 1995, c. 49, § 1 and P.L. 1995, ch. 50, § 1

Sec. 1. 29-A MRSA § 03, as enacted by PL 1993, c. 683, Pt. A, § 2 and affected by Pt. B, § 5, is repealed.

Sec. 2. 38 MRSA c. 28, as amended, is repealed.